

EHARDT SMITH & TORGESEN  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

HOLM CONSTRUCTION, LLC, an  
Idaho Limited Liability Company, in the  
name of THE UNITED STATES OF  
AMERICA,

Plaintiff,

vs.

DESERT SAGE CONTRACTORS, INC.,  
an Idaho Corporation, and  
DEVELOPERS SURETY AND  
INDEMNITY COMPANY, Surety,

Defendants.

Case No. CV-03-273-E-LMB

ANSWER AND COUNTERCLAIM

COME NOW, the Defendants, DESERT SAGE CONTRACTORS, INC.,  
an Idaho Corporation, (hereinafter "Desert Sage"), and DEVELOPERS SURETY AND  
INDEMNITY COMPANY, (hereinafter "Developers"), by and through their attorneys of

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record, Marty R. Anderson and the law firm of Ehardt, Smith & Torgesen, PLLC, and in response to Plaintiff's Complaint on file herein admits, denies, and answers as follows:

### FIRST DEFENSE

Plaintiff's Complaint fails to state a cause of action upon which relief can be granted.

### SECOND DEFENSE

1. Desert Sage and Developers admit the allegations of paragraph 1.
2. Desert Sage and Developers admit the allegations of paragraph 2.
3. Desert Sage and Developers admit the allegations of paragraph 3.
4. Desert Sage and Developers admit the allegations of paragraph 4
5. Desert Sage and Developers admit that Desert Sage was awarded a contract to complete certain improvements to the Cress Creek Trail but deny the remaining allegations of Paragraph 4
6. Desert Sage and Developers admit that Developers issued a bond on behalf of Desert Sage but deny the remaining allegations of Paragraph 6.
7. Desert Sage and Developers admit that Desert Sage contracted with Holm Construction, LLC, (hereinafter "Holm"), but deny the remaining allegations of Paragraph 7 and affirmatively allege that the contract also included a bid sheet.
8. Desert Sage and Developers admit that Desert Sage made payment to Holm in the amount of \$20,000 but deny the allegations of Paragraph 8 and affirmatively

alleges that Holm signed a release waiving its right to collect further payment.

9. Desert Sage and Developers deny the allegations of paragraph 9.

10. Desert Sage and Developers deny the allegations of paragraph 10 and affirmatively allege that Holm in fact breached the subject agreement.

11. Desert Sage and Developers admit that the date when work was last performed was on or before August 13, 2002 but deny the remaining allegations of Paragraph 11.

12. Desert Sage and Developers deny the allegations of paragraph 12 as to performance by Holm.

13. Desert Sage and Developers deny the allegations of paragraph 13.

14. Desert Sage and Developers deny the allegations of paragraph 14 and assert that \$10,000 is an unreasonable attorney fee.

#### THIRD DEFENSE

Holm has signed a release absolving Desert Sage and Developers from further liability herein and waiving any right to assert further claims.

#### FOURTH DEFENSE

Desert Sage and Holm have reached an accord and satisfaction regarding any disputed amounts regarding the subject Contract and the matter has been thus resolved.

### FIFTH DEFENSE

Desert Sage and Developers are entitled to credit for payments made under the contract.

### COUNTERCLAIM

COME NOW, the Defendants, DESERT SAGE CONTRACTORS, INC., an Idaho Corporation, (hereinafter "Desert Sage"), by and through its attorneys of record, Marty R. Anderson and the law firm of Ehardt, Smith & Torgesen, PLLC, and by way of Counterclaim against the Plaintiff Holm Construction, LLC, (hereinafter "Holm"), alleges as follows:

1. That Desert Sage is a corporation duly organized and existing under the laws of the State of Idaho with its principal place of business in Idaho Falls, Bonneville County, Idaho.
2. That Holm is a limited liability company duly organized and existing under the laws of the State of Idaho with its principal place of business in Pocatello, Bannock County, Idaho.
3. That this Court has supplemental jurisdiction over this counterclaim pursuant to 28 U.S.C.A. § 1367.

### FACTS

4. In the spring of 2002, Desert Sage sought to obtain the contract for certain trail improvements to be performed under the direction of the Bureau of Land

Management on the Cress Trail near Heise Hot Springs. Desert Sage sought and secured various proposals for subcontract work (including construction of concrete sidewalks and other concrete items) on the Cress Trail Project prior to bidding the job on or about April 2, 2002.

5. After negotiations, a contract was issued to Holm Construction in the amount of \$55,050. Said contract was issued on a unit price basis consistent with Desert Sage Contractors contract, i.e. sidewalk by the square yard, curbing by the linear foot, structural concrete by the cubic yard. A true and correct copy of the bid and job schedule is marked Exhibit "A", attached hereto and incorporated by this reference.

6. Said contract required Desert Sage Contractors to construct the sidewalk sub-grade and to furnish the concrete at the site for handling by Holm Construction. Holm accepted the contract and agreed to commence work in accordance therewith.

7. Holm breached the contract by failing to perform work in a timely manner, by overstating the work completed and by other means.

8. Based on the material breaches, Desert Sage decided to terminate Holm and complete the work with its own crews.

9. Desert Sage reviewed the contract with Holm and paid them on August 14, 2002 in accordance with work believed to have been actually performed as of the day Holm left the job.

10. After further review, Desert Sage determined that the proper amount owed to Holm for work completed was \$18,432.43 for all Schedule B work completed.

11. Additionally, there were some materials purchased by Desert Sage and other credits against the bid. Desert Sage was to be credited for a purchase of linseed oil (\$600.00), for pouring some concrete footings (\$481.32), and for a return of concrete sent back (\$210.68). These adjustments to the contract would produce a net amount due to Holm from Desert Sage of \$17,141.11. Therefore, Holm has actually received an unearned windfall of approximately \$2,858.89.

12. At the time the check was tendered to Holm, Desert Sage required a Lien Release to be signed. The Lien release was executed on behalf of Holm by Jason Holm on August 14, 2002. A true and correct copy of the Lien Release is attached hereto, marked Exhibit "B", and incorporated by this reference.

13. Holm thereafter wrongfully brought this action against Desert Sage and Developers causing them to incur attorney fees and costs. Desert Sage is entitled to recover its reasonable attorney fees and cost in accordance with I.C. § 12-120(3) and other applicable law in the amount of \$5,000 in the event this matter is uncontested and in such other amount as may be determined by the Court in the event this matter is contested.

#### COUNT I – Breach of Contract

14. Desert Sage realleges the allegations of paragraphs 1 through 13 of

the Counterclaim on file herein as though the same were set forth in full.

15. Holm breached the subject Contract thereby causing Desert Sage to perform the balance of the contract at increased cost in an amount to be determined at trial.

16. As a result of said breach and in addition to damages, Desert Sage is entitled to recover costs and attorney fees in accordance with I.C. § 12-120(3) and/or other applicable law.

#### COUNT II – Unjust Enrichment

17. Desert Sage realleges the allegations of paragraphs 1 through 16 of the Counterclaim on file herein as though the same were set forth in full.

18. Desert Sage inadvertently overpaid Holm and/or did not otherwise receive proper credit for various items.

19. As a result, Holm has been unjustly enriched in the amount of \$2,858.89 or in such other amount as may be determined at trial.

WHEREFORE, Desert Sage prays the judgment, order and decree of this court, as follows:

1. That Holm's Complaint be denied and that judgment be entered in favor of the Desert Sage and Developers;

2. That Desert Sage's Counterclaim be granted and that judgment be entered in its favor;

3. That Desert Sage be awarded damages for breach of contract in an amount to be determined at trial.


4. That Desert Sage be awarded damages for Holm's unjust enrichment in the amount of \$2,858.89 or in such other amount as may be determined at trial.

5. That Desert Sage be awarded its attorney fees and costs incurred in accordance with I.C. § 12-120(3) and other applicable law in the amount of \$5,000 in the event this matter is uncontested and in such other amount as may be determined by the Court in the event this matter is contested.

6. That Defendant/Counterclaimant be granted such other and further relief as the court may deem just and equitable pursuant to Federal Rule of Civil Procedure 54.

DATED this 19<sup>th</sup> day of October, 2004

EHARDT SMITH & TORGESEN, PLLC

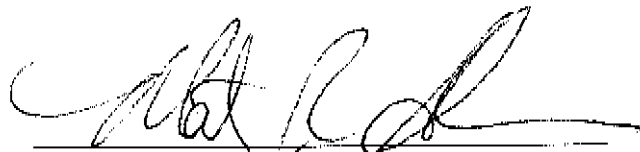
By   
Marty R. Anderson  
Attorneys for Defendants Desert Sage and  
Developers



CERTIFICATE OF SERVICE BY MAIL, HAND DELIVERY  
OR FACSIMILE TRANSMISSION

I hereby certify that a true and correct copy of the foregoing document was on this date served upon the persons named below, at the addresses set out below their name, either by mailing, hand delivery, or by telecopying to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; or by facsimile transmission.

DATED this 20<sup>th</sup> day of October, 2004.

  
Marty R. Anderson

Stephen J. Blaser, Esq.  
Blaser, Sorensen & Hansen, Chartered  
285 N.W. Main  
P.O. Box 1047  
Blackfoot, ID 83221

☒ Mail  
☐ Hand Delivery  
☐ Facsimile

# Exhibit A

## STATEMENT AND ACKNOWLEDGMENT

OMB No. 0000-0014  
Expires 03/31/02

Not reporting burden for this submission of information is estimated to average 1.5 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the PRA Secretariat (0750), Office of Federal Acquisition and Regulatory Policy, OPA, Washington, DC 20408; and to the Office of Management and Budget.

## PART I - STATEMENT OF PRIME CONTRACTOR

1. PRIME CONTRACT NO.	2. DATE SUBMITTER ACCEPTED	3. SUBMITTER'S ADDRESS
NDC 020081	MAY 10, 02	CR633 01
4. PRIME CONTRACTOR'S NAME, ADDRESS AND ZIP CODE	5. SUBMITTER'S NAME, ADDRESS AND ZIP CODE	
DESERT SAGE CONTRACTORS, Inc. 445 N. CAPITAL AVE. SUITE 5E IDAHO FALLS, IDAHO 83402	HOLM CONSTRUCTION LLC 1945 N. INKUM ROAD INKUM, IDAHO 83401	

6. The prime contractor states that under the contract shown in item 1, a subcontract was entered on the date shown in item 2.  
Name of subcontracting

to the subcontractor identified in item 5, for the following work:

CONCRETE FORMING, PLACEMENT, FINISHING AND CURING.  
[CONCRETE AND JOISTS FINISHING BY DOCKT (S)]

7. PROJECT	8. LOCATION
CHILL CREEK TOWN AND PARKING LOT	MADISON Co Idaho
9. NAME AND TITLE OF PERSON SIGNING	10. DATE SIGNED
Wm. P. RANKE BARR, PRESIDENT	5/14/02

## PART II - ACKNOWLEDGMENT OF SUBCONTRACTOR

12. The subcontractor acknowledges that the following clauses of the contract shown in item 1 are included in this subcontract:

Contract Work Hours and Safety	Davis-Bacon Act
Standards Act - Overtime	Apprentices and Trainees
Construction - Construction	Compliance with Federal Regulations
Payroll and Social Security	Subcontractors
Withholding of Funds	Contract Termination/Default
Dispute Concerning Labor Standards	Certification of Eligibility

13. NUMBER OF ANY SUBCONTRACTS (SUBS) IDENTICAL TO THIS

NONE

14. NAME AND TITLE OF PERSON SIGNING	15. DATE SIGNED
JASON HOLM, PRESIDENT	5-18-02

NEW 7500-01-1001-0007

**HOLM CONSTRUCTION LLC**

1995 N INKOM RD.

INKOM, ID. 83201

208-243-4656 OR 208-775-1912

FAX# 208-775-4784

**Estimate**

DATE	ESTIMATE #
4/19/02	201

<b>BILL TO</b> DESERT SAGE 208-522-1144 FAX# 208-552-9830 ATTN: RANCE
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ITEM	DESCRIPTION	AMOUNT
	CRESS CREEK TRAIL	0.00
SCHEDULE A-10	SIDEWALK	5,175.00
SCHEDULE A-13	CURB	5,800.00
SCHEDULE A-16	STRUCTUAL CONCRETE	1,425.00
SCHEDULE B-8	CULVERT HEAD WALLS	1,900.00
SCHEDULE B-11	SIDEWALK	32,500.00
SCHEDULE B-14	STRUCTUAL CONCRETE	8,550.00
	BID INCLUDES LABOR, FORMS, CURE, AND LINN SEED OIL	0.00
<b>Total</b>		<b>55,050.00</b>

PLEASE CONTACT JASON HOLM @ 243-4650 IF YOU HAVE ANY  
QUESTIONS ? THANK YOU

# Exhibit B

## LIEN RELEASE

FROM: Holm Construction

PROJECT: Cress Trail Reconstruction

TO: Desert Sage Contractors, Inc.

CONTRACT NO: NDB00200005

### CONDITIONAL RELEASE

### WORK PERFORMED

The undersigned does hereby release all mechanic's liens, stop notice, equitable lien and labor and material bond rights against the above described labor services, etc..., purchased acquired or furnished by or for us and used on above premises up to and including 8/14/02. This release is for the benefit of, and may be relied upon by the owner, the prime contractor, the construction lender, and the principal and surety on any labor and material bond.

This release is CONDITIONAL, and shall be effective only upon payment to the undersigned in the sum of \$20,000

If the payment is by check, this release is effective only when the check is paid by the bank upon which it is drawn.

FIRM NAME: HOLM CONSTRUCTION, LLC

BY: *Jason Holm*

DATE: 8-14-02

NOTARY

STATE OF IDAHO

SS,

COUNTY OF BONNEVILLE

On this 14<sup>th</sup> day of August, 2002, before me,

Edna Larsen a Notary Public in and for said State, personally appeared

Jason Holm, Known or identified to me to be the person whose name is attached to the forgoing Release, and acknowledged to me that (he/she) executed the same.

IN WITNESS WHEREOF, I have hereunto placed my official hand and seal the day and year in this Certificate first above written.

Notary Public of Idaho

Residing at Idaho Falls, ID

Commission Expires: 3-26-2005

